EMPLOYMENT STANDARDS TRIBUNAL

In the matter of an appeal pursuant to Section 112 of the

Employment Standards Act R.S.B.C. 1996, C.113

- by -

Middlegate Development
(the " Employer ")

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

ADJUDICATOR: Mark Thompson

FILE No.: 1999/783

DATE OF DECISION: May 4, 2000

DECISION

OVERVIEW

Middlegate Development Ltd. (the "Employer") appealed a Determination issued by a delegate of the Director of Employment Standards (the "Director") on December 6, 1999 pursuant to Section 112 of the *Employment Standards Act* (the " *Act"*). The Determination found that the Employer owed Jerome Henen $2,691.65 for unpaid wages, vacation pay, travel expenses and interest pursuant to a contract of employment. Jerome Henen and his wife, Shirley Henen, were employed by Middlegate Development as caretakers in a building it managed. The Henens resided in the building.

The Employer appealed the Determination on the grounds that it incorrectly interpreted the contract of employment between the Employer and the Henens with respect to a rent credit and that it contravened the *Act* by requiring the Employer to pay the Henens for travel expenses.

This decision was based on written submissions from the parties.

ISSUE TO BE DECIDED

The issues to be decided in this case are: what was Jerome Henen's compensation under his contract of employment; and was the Employer required to reimburse his travel expenses to hearings away from the location of his employment.

FACTS

Jerome and Shirley Henen worked for the Employer from November 26, 1997 to May 29, 1998 to perform work related to the maintenance of a 39-suite apartment building. They resided in the building. There is no dispute between the parties that the position was part time. However, neither the former employees nor the Employer kept records of hours worked. The Henens presented evidence from tenants praising their work. Management was concerned that they were spending too many hours on their duties. The Employer gave both employees written notice of termination within the terms of the *Act*, and the circumstances of the termination were not in dispute.

The contract between the Employer and the Henens established their compensation as follows:

> The compensation will be $1,070.00 without including a rent credit of 350.00. This compensation of $1,420.00 recognizes that they will work a minimum of 4 continuous hours and that they are on call during the remainder of each day. As this building is less than 60 units it is considered a part-time position and the minimum wage estimate is $1,075.20. Any sum paid above the minimum wage is paid in order that they may compensate someone to be on call and to provide them with time off as required by statute and as their schedule permits. This payment would be deductible for income tax purposes. . . . .

> The managers must occupy the managers' suite #112 as designated by the firm and complete a rental agreement in the same manner as any other resident. Rent of $575.00 will be paid by the managers in advance on the last day of the month and a security deposit of $462.50 will be paid in advance prior to occupying the suite. The managers will pay for the same services as do all residents of the complex.

The Director's delegate found that Jerome Henen was the resident manager pursuant to the definition of "resident caretaker" in the *Employment Standards Regulation* (the "*Regulation"*) and was not entitled to overtime wages. She further found that Shirley Henen was an employee under the *Act* and entitled to the protections it provides. Although the Employer originally asserted that the position was part-time for one person, the Determination found that the Henens were hired as a couple so that Shirley could provide the 32-hour relief for Jerome. Thus, Jerome was not entitled to any compensation for work within the 32-hour relief period. Neither party appealed these conclusions.

Jerome received a base pay of $726 per month, plus additional wages for work in beyond his regular duties. Shirley received $334.00 per month. The delegate found that each person was employed under a separate employment contract, Jerome as resident caretaker and Shirley as relief resident caretaker. Jerome was entitled to the minimum wages specified in Section 17 of the *Regulation*. The *Regulation* required Jerome to receive $1075.20 per month from November 1, 1997 through March 31, 1998 and $1099.80 per month from April 1, 1998 through May 28, 1998. The base salaries of Jerome and Shirley combined were $1,060.00 per month. If a rental credit of $350 were added to Jerome's salary, he received $1,076 per month. However, the delegate found that the contract of employment did not include the rent credit, so Jerome's compensation fell below the minimum required by Section 17 of the *Regulation*. The Determination found that the Employer owed Jerome the difference between the minimum wage and his base pay for each month between the commencement of his employment in November 1997 and his termination in May 1998, for a total of $2,287.76. Judy Taylor, Administrator for the Employer, stated in a statutory declaration that she informed the Henens that their salary included the rent credit. Jerome provided a written statement to the Tribunal asserting that he did not understand that the rent credit was part of his wages and that he was unfamiliar with Canadian compensation practices. The market rent of the apartment in which the Henens lived was $950 per month.

On a number of occasions, Jerome was required to appear at Residential Tenancy Branch arbitrations on behalf of the Employer. He used public transportation to attend. The delegate found that the transit fares were a business expense, and Section 21(2) of the *Act* required the Employer to reimburse him.

The Employer appealed two elements of the Determination: that Jerome's compensation included the rent credit, so he was not owed any unpaid wages and that his expenses to attend the arbitration hearings were not business expenses under the *Act*.

Counsel for the Employer also argued that the Tribunal should award costs to the Employer.

ANALYSIS

The heart of the dispute over the Jerome Henen's rate of pay lies in the status of the rent credit. Although the delegate did not discuss the provision, Section 21(1) of the *Act* prohibits deductions from an employee's wages except in specific circumstances, which are set out in Section 22. Paragraph 4 of Section 22 is relevant to this dispute.

> An employer may honour an employee's written assignment of wages to meet a credit obligation.

The Employer argued that the contract of employment (entitled a "Memorandum of Understanding") constituted a written assignment of wages under Section 22(4). Since Jerome's direct wage (without the rent credit) clearly fell below the minimum, the delegate argued in effect that the Employer had no right to include the $350 rent credit as compensation, since the contract was not a written assignment of wages under Section 22(4). The delegate pointed out in the Determination that the memorandum of understanding referred to compensation of $1,070 "without including a rent credit of $350.00." She concluded that the rent credit was not wages for the purposes of the *Act*.

The Director argued that the Memorandum of Understanding did not constitute a "written assignment of wages" as contemplated by Section 22(4) of the *Act*.

The Tribunal dealt with this question in *Re Sophie Investments*, BCEST #D528/97. In that case, Ms. Avery, a residential caretaker was employed under a contract that included two elements of compensation, a "free suite (Declared for tax purposes at less then [sic] the market value)" and a monthly rate of pay based on the *Act*. Taken together the two components were equal to the minimum wage. After the termination of her employment, Ms. Avery filed a complaint with the Employment Standards Branch. She alleged that she had not received the minimum wage for residential caretakers as required by the *Regulation* on the grounds that the employer could not deduct the amount assigned to the "free suite" from her wages because of Section 21(1) of the *Act*. The Director's delegate issued a determination upholding Ms. Avery's position. The employer appealed the determination.

Adjudicator Lawson cancelled the determination as it related to the rental credit. He stated in paragraphs 13 and 14:

> If Sophie is to succeed on this part of its appeal, it can only be because the deduction of rent from Ms. Amery's wages was a 'written assignment of wages to meet a credit obligation". The phrase 'credit obligation' seems capable of broad interpretation and has been so interpreted on occasion by this Tribunal. Interpretation of the Act is also tempered by the Tribunal's desire to provide an expeditious and efficient resolution to matters in dispute. While written assignments pursuant to section 22(4) should be in clear terms, I do find there was no doubt in the mind of both parties that Ms. Amery's rent was being paid directly to her employer out of her monthly wages.
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> There is unambiguous language in the contract of employment that Ms. Amery was to be paid a total of $1,192.80 per month, but $320.00 of that amount would be allocated to rent. I impute no literal meaning to the unfortunate choice of the

> word 'free' in the contract referring to the caretaker's suite, as it is clear to me that the parties understood rent would be paid through a deduction from wages. This state of affairs is undoubtedly awkward and the employer should require a much clearer written assignment of wages and should revise its contract of employment to better reflect the desired interpretation of section 22(4) of the Act. The best course is for the employer to pay the minimum wage in its entirety to the employee, and then expect the employee to make a separate payment of rent, thus avoiding the need to rely on a generous interpretation of section 22(4). Nevertheless, I am satisfied that in signing her contract of employment, Ms. Amery gave Sophie a written assignment of her wages to meet her monthly obligation for rent.

The Director appealed Adjudicator Lawson's decision, and Adjudicator Stevenson in *Re British Columbia (Director of Employment Standards)* BC EST #D447/98 upheld the previous decision.

In this case, a reading of the full text of the Memorandum of Understanding leads to the conclusion that both parties knew or should have known that Jerome Henen's total compensation included the rent credit. The Director's delegate correctly pointed to the phase "The compensation will be $1,070 without including a rent credit of $350.00" as ambiguous. However, the following sentence begins "This compensation of $1,420.00" a reasonably clear statement of the total compensation It should be noted that Jerome's base pay, plus the rent credit was almost exactly the minimum wage for residential caretakers under Section 17 of the *Regulation*. While the wording of the two contracts obviously is different, the text of the agreement in this case falls squarely under the principle set out by Arbitrator Lawson in the first *Sophie Investments* decision. In *Re Gateway West Management Corp*. BCEST #D356/97, Adjudicator Thornicroft took the same position in holding that it would be incorrect to include that the value of accommodation provided by the employer not be considered as wages for the purpose of Section 17 of the *Regulation*. With respect to the Director's delegate, I think that the position of the Tribunal reflects a common sense view of the terms and conditions of employment of residential caretakers and is consistent with the *Act*. Therefore, I find that Jerome Henen's wages as a residential caretaker were $1,076.00.

The Employer argued that it should not be liable for expenses Jerome Henen incurred in attending an arbitration hearing. The Director's delegate did not comment on this point. The basis for the decision on this point is the definition of "wages" in the *Act.* Section 1(h) of the *Act* excludes "allowances or expenses' from the definition of wages. The Determination relied on Section 21(2) of the *Act* that states:

> An employer must not require an employee to pay any of the employer's business costs except as permitted by the regulations.

In this case, the Employer did not require Jerome Henen to pay any business expense; it did not reimburse him for expenses incurred in the course of his duties. Such expenses clearly fall outside the definition of wages as cited above. The Tribunal has consistently held that mileage and travel expenses do not constitute wages and fall outside of the jurisdiction of the Director to collect. See *Re Boyko* BC EST #D124/96; *Re Vasiluk* BC EST #D022/97.

Counsel for the Employer argued that the Tribunal should award his clients costs for the appeal. He cited no precedent for this action. The rationale for his argument was that he had stated the principles of law as established by the Tribunal to the Director, but the Determination issued disregarded or contravened those principles.

No evidence exists that the Director's delegate disregarded the Tribunal's decisions. In the case of the contract of employment, the language was not as clear as one would have wished, and the complainant stated that he did not understand its implications. The delegate chose one interpretation, and this decision disagreed. No statement from the Director indicated that she or her delegates were not adhering to the Tribunal's case law.

ORDER

For these reasons, the Determination of December 6, 1999 is cancelled. The Employer's motion to award costs is denied.

Mark Thompson
Adjudicator
Employment Standards Tribunal